# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 2773

Heard in Montreal, Tuesday, 8 October 1996

concerning

## CANADIAN PACIFIC LIMITED

and

## TRANSPORTATION COMMUNICATIONS UNION

**DISPUTE – UNION;**

The assignment of overtime at Vaughan Terminal on September 23, 1995.

**DISPUTE – COMPANY:**

Overtime claim submitted on behalf of Mr. Brian Gilmore for time worked by a more senior employee on September 23, 1995.

**UNION'S STATEMENT OF ISSUE:**

On September 23, 1995, the Company offered overtime to Mr. C. Belanger, in violation of the provisions concerning the maximum allowable hours of work under the Canada Labour Code. The grievor, Mr. B. Gilmore, who holds less seniority than Mr. Belanger, was available for overtime and would not have exceeded the maximum hours of work provisions under the Canada Labour Code had it been offered to him.

The grievor submitted a claim for six hours, claiming that the Company should have called him for the overtime. The Company declined the claim. The Union submitted a grievance under article 9.7 of the collective agreement, claiming six hours at overtime rates for the grievor. The Company amended the claim to five hours, which the Union accepts, and declined the grievance.

**COMPANY'S STATEMENT OF ISSUE:**

On September 23, 1995, the Company assigned overtime totaling 5 hours to Mr. C. Belanger.

The Union progressed a grievance claiming six hours overtime on behalf of junior employee Mr. B. Gilmore. The Union alleged that by offering the overtime to Mr. C. Belanger, the Company violated the maximum allowable hours of work under the Canada Labour Code.

The Union maintained that Mr. Gilmore was available for the overtime and that he would not have exceeded the maximum hours of work provisions under the Canada Labour Code had it been offered to him.

The Company has declined the union's grievance. The Company maintains that no violation of the terms of the collective agreement has occurred and that the arbitrator does not have the jurisdiction to determined violations of the Canada Labour Code.

**FOR THE UNION:**

**(SGD.) P. J. CONLON**
**Assistant DIVISIONAL VICE-PRESIDENT**

**FOR THE COMPANY:**

**(SGD.) C. GRAHAM**
**FOR: GENERAL MANAGER, FACILITIES & ASSET MANAGEMENT**

There appeared on behalf of the Company:
C. Graham – Labour Relations Officer, Calgary

And on behalf of the Union:
P. J. Conlon – Assistant Divisional Vice-President, Toronto

## AWARD OF THE ARBITRATOR

The facts in this case are not in dispute. Mr. C. Belanger, who is senior to the grievor, was assigned to work overtime from 13:30 hours to 18:30 hours on September 23, 1995. The assignment was as a result of the unforeseen illness of employee N. Prust who booked off during the course of his shift, when assigned as a Utility Groundperson (Scale). The Company therefore called Mr. Belanger to replace Mr. Prust. As events unfolded, when Mr. Belanger reported for work a second employee, Craneperson Macchione, had also left work because of illness. In the result, Mr. Belanger was assigned to the craneperson vacancy, as there was greater urgency to fill that position. Mr. Prust's job was left unfilled for the balance of the shift.

There is no argument that the Company assigned the overtime work to the senior qualified employee. While both Mr. Belanger and the grievor, Mr. Gilmore, were qualified to perform the craneperson's work, Mr. Belanger is senior to the grievor. It is common ground that the assignment so given to Mr. Belanger caused him to work in excess of forty-eight hours for the week, contrary to section 171(1) of the **Canada Labour Code**.

The Union invokes the provisions of article 9.7 of the collective agreement which reads, in part, as follows:

> **(b)** Work in a particular office, shed or work location which is not identifiable as belonging to a specific position due to there being two or more positions in the same job classification and performing the same work:
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> ...
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> **(2)** Work which is required to be performed at overtime rates and which is brought about by an employee being absent and the Company requiring a replacement, shall first be assigned to the senior qualified employee in that job classification in such office, shed or work location, where such overtime is required and who has signified a desire to work overtime pursuant to paragraph (3) of this Clause (b); however, if overtime work remains to be assigned, the junior available qualified employee in that job classification in such office, shed or work location will be required to work the overtime.
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> ...
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> **NOTE: The provisions of Clauses (a) and (b) above shall apply to the extent they are consistent with the Canada Labour Code in respect of the maximum number of hours of work per week.**
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> [emphasis added]

The submission of the Union is relatively straightforward. It asserts that the Company violated the provisions of article 9.7 by calling Mr. Belanger to perform overtime to a degree which exceeds the maximum number of hours per week permissible under the **Canada Labour Code**, contrary to the clear provisions of the note appearing within the text of article 9.7. Its representative stresses that the Union does not seek an interpretation of the **Canada Labour Code** from the Arbitrator, nor compensation for a violation of the **Code**. Rather, he characterizes the grievance as related to a violation of the standards agreed to by the parties, incorporated within article 9.7 which are based on the provisions of the **Code** relating to the maximum hours of work per week. The Union argues that it was contrary to the provisions of the collective agreement, and in particular to the note in article 9.7, for the Company to call Mr. Belanger to perform overtime work if to do so, as occurred, caused him to work in excess of forty-eight hours in the week. Put differently, the Union submits that if the forty-eight hour limitation had been respected, Mr. Belanger would not have been assigned the overtime, and other employees, including Mr. Gilmore, were available for such assignment without violation of the standards of article 9.7.

Before the Arbitrator the parties made reference to the following provisions of the **Canada Labour Code** relating to maximum hours of work in a week:

> **171 (1)** An employee may be employed in excess of the standard hours of work but, subject to section 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by an employee in any week shall not exceed forty-eight in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employer.
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> **177 (1)** The maximum hours of work in a week specified in or prescribed under section 171, established pursuant to section 172 or prescribed by regulation s made under section 175 may be exceeded, but only to the extent necessary to prevent serious interference with the ordinary working of the industrial establishment affected, in cases of
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> **(a)** accident to machinery, equipment, plant or persons;
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> **(b)** urgent and essential work to be done to machinery, equipment or plant; or
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> **(c)** other unforeseen or preventable circumstances.

The Company makes a number of submissions. It argues, firstly, that this Office has no jurisdiction to apply or enforce the **Canada Labour Code**, or to direct to make order for compensation for any violation of its terms. Secondly, it argues that the grievor cannot advance a claim, as he was not the most senior available employee among those who were available. It maintains that if the Union's interpretation of the collective agreement had been honoured, a person other than Mr. Gilmore would in all likelihood have received the overtime assignment.

The Company next argues that even if Mr. Gilmore can make some colourable claim to the work, it would not have been appropriate to call him as he had completed his previous shift on September 23, 1995 only five and a half hours prior to the scheduled commencement of the overtime work which was assigned to Mr. Belanger. Stressing that the work in question involved an assignment in the safety sensitive position of a crane operator, the Company argues that no employee should be so assigned without a minimum of eight hours' rest between tours of duty, including overtime work.

Lastly, the Company maintains that, should the standards of the **Canada Labour Code** be found to be incorporated within the collective agreement, it is not in violation of those standards. Its representative makes specific reference to section 177(1) of the **Code**, and in particular argues that paragraph 1(c) applies, as the Company was faced with unforeseen circumstances in the illness of the crane operator during the course of his tour of duty, and the need to maintain crane operations as an essential part of the workings of the Vaughan Intermodal Yard.

The first issue to be determined is whether the Arbitrator can have regard to the provisions of the **Canada Labour Code** in the case at hand. I am satisfied that not only can I have reference to them, but I must. For reasons which they best appreciate, the parties have incorporated, by reference, the provisions of the **Canada Labour Code** in respect of the maximum number of hours per week within the text of article 9.7 of their collective agreement. It is not uncommon for parties to a collective agreement to incorporate by reference provisions from other documents, including statutes and regulations, as part of their collective agreement. That is what the parties have done in the instant case. In the result, the Arbitrator is compelled to treat the provisions of the **Canada Labour Code**, which govern the maximum hours which an employee may work in a given week, as being an integral part of the terms of the collective agreement. To do so is to interpret and apply the agreement, and not the **Code**; any remedy or compensation which may issue is, as a result, related to a violation of the collective agreement, a matter squarely within the jurisdiction of this Office.

The Arbitrator cannot sustain the argument of the Company with respect to the legitimacy of the grievor's claim, given that other more senior employees might have been assigned the work. It is common ground that other employees did not grieve. As the Union argues, the principles which govern in such a situation were well articulated by Arbitrator Gorsky in **Canadian Rock Salt Co. and United Automobile Workers** (1974), 6 L.A.C. (2d) 316. In that case the Arbitrator rejected the claim of the Company that the grievance of a junior employee should be denied as there were other more senior employees who might have grieved successfully. At p. 318 the following comments appear:

> The company cannot rely on its own innocent error in failing to call on the "lowest employee" as required under art. 5.10.13, as an available defence against the grievor. See *Re United Mine Workers, Local 14059, and Gerber Products of Canada* (1968), 19 L.A.C. 301 (Weatherill) and *Re Gulf Oil Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-593* (1974), 5 L.A.C. (2d) 1876 (Rayner) at p. 188.
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> There is no evidence of any grievance having been pursued by the two employees being lower in credited overtime than the grievor. If the company's interpretation of art. 5.10.13 was accepted it would mean that by **not** calling on the employee with the least credited overtime the company might, where such employee did not grieve, avoid the claims of all other employees ...
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> [original emphasis]

In my view, the above statement correctly reflects the principle which is now well established within Canadian arbitral jurisprudence, namely that in a claim such as this a grievor is not disqualified merely by virtue of the fact that other employees might have made the same claim, but in fact did not. It cannot be known with any certainty whether the other employees would, if offered the opportunity, have taken the overtime work in question. Moreover, the willingness of other employees to pursue a grievance cannot limit the right of the grievor to do so.

Nor can the Arbitrator give great substance to the argument of the Company with respect to whether the grievor would have been assigned the work by reason of his previous work schedule and the number of hours of rest which he received. It is conceded that there is no provision within the **Canada Labour Code** which would have prevented Mr. Gilmore from accepting the overtime work. As his Union representative stresses, if called it would have been a matter of his own judgement as to whether he was sufficiently rested and fit to work safely. Moreover, it would appear that the guideline of eight hours' rest raised by the Company's representative is not uniformly applied at the Vaughan facility, and that other employees have previously been called for overtime work without strict regard to that standard. Most importantly, the failure of the Company to call the grievor, or to consider calling him, prevented any real consideration of his actual state of rest and ability to perform the work at the time in question. While it may be that the Company could have been in a position to invoke safety considerations, it could only have done so when regard was had to the grievor's pattern of work and rest over a substantial period of time, the likely duration of the overtime work and any other factors which would have then been pertinent to a decision. Very simply, that analysis was never entered into as the grievor's eligibility to perform the work was never in fact considered. In the result, the Arbitrator is not persuaded that the possible disqualification of Mr. Gilmore for lack of rest can fairly be raised as a bar to his claim by the Company at this time.

The final consideration is the application of section 177(1) of the **Code** as it bears on the meaning of article 9.7 of the collective agreement. The Arbitrator agrees with the Company that section 177(1) must be taken to be incorporated into article 9.7, as it clearly bears on the maximum number of hours of work per week which an employee can perform. I would also be inclined to agree that what arose in the case at hand can fairly be characterized as "unforeseen or unpreventable circumstances" within the meaning of sub-paragraph 1(c) of section 177 of the **Code**. The booking off of two employees during the course of their shift was plainly unforeseen and beyond the control of the Company.

However, I am not persuaded that section 177(1) must be interpreted to mean that the mere presence of unforeseen circumstances gives an unfettered licence to the Company to assign employees to hours of work in excess of the permissible work week. As the language of the provision clearly indicates, the maximum hours may be exceed "but only **to the extent necessary** to prevent serious interference with the ordinary working of the industrial establishment ..." [emphasis added]. Was the assignment of excessive overtime work to Mr. Belanger "necessary" as disclosed in the facts of the case at hand? I think not. It can hardly be asserted that it was necessary to call Mr. Belanger if, as was the case, several other qualified employees, including the grievor, were readily available to perform the work in question. If it could be shown that Mr. Belanger was the only available qualified person, it would appear to the Arbitrator that the conditions of section 177(1) would be made out and that the assignment of overtime hours could have been made to Mr. Belanger without violating the provisions of article 9.7 of the collective agreement. That was not the case, however. Because other persons were available and capable of doing the work, it was not necessary for the Company to call upon Mr. Belanger to do it, and the exception provided for in section 177(1) did not apply.

In the result, the Arbitrator is compelled to the conclusion that the Company did violate the provisions of article 9.7 of the collective agreement by assigning excessive overtime work in a given work week to Mr. C. Belanger. Had the collective agreement been honoured, Mr. Belanger would not have been offered the assignment, and it would then have become available to other employees, including Mr. Gilmore, who could have performed the work without exceeding the standards of maximum working hours incorporated within article 9.7 of the collective agreement.

In the result, the grievance is allowed. The Arbitrator finds and declares that the Company violated article 9.7 of the collective agreement by assigning overtime work to Mr. C. Belanger in excess of the standards contemplated within article 9.7 of the collective agreement. The Company is directed to compensate the grievor, Mr. B. Gilmore, for five hours of work at overtime rates.

October 11, 1996

**(signed) MICHEL G. PICHER**
**ARBITRATOR**